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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

MAY 21 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Joint Petition of the Consumer Federation
of America and the National Cable
Television Association, Inc., for
Rulemaking and Request for Establishment
of a Joint Board)

RM-8221

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COMMENTS OF THE PEOPLE OF THE STATE
OF CALIFORNIA AND THE PUBLIC UTILITIES
COMMISSION OF THE STATE OF CALIFORNIA

MAY 21 1993

FCC MAIL BRANCH

Pursuant to DA 93-463 released April 21, 1993, the People of the State of California and the Public Utilities Commission of the State of California ("California") hereby respectfully submit their comments on the petition of the Consumer Federation of America ("CFA") and the National Cable Television Association, Inc. ("NCTA") for rulemaking and request for the establishment of a Joint Board. As stated in DA 93-463, the CFA/NCTA joint petition seeks "the commencement of a rulemaking to establish separations, cost accounting and cost allocation rules for video dialtone service and . . . the establishment of a Federal-State Joint Board to recommend procedures for separating the cost of local telephone company plant that is used jointly to provide telephone service and video dialtone."

California concurs with CFA/NCTA's invocation of the well established proposition that the costs of providing interstate services must be separated from the costs of providing intrastate services. See, e.g., 47 U.S.C. § 410(c); Crockett Telephone Co.


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v. FCC, 963 F.2d 1564 (D.C. Cir. 1992). One of the primary purposes of such jurisdictional cost separation is the patent unfairness of burdening the users of services in one jurisdiction with the costs incurred to provide services in the other jurisdiction. Another is to enable regulatory authorities in

interstate costs.¹

As noted in the CFA/NCTA joint petition, there is considerable merit to developing cost allocation rules that protect the users of traditional basic telephone services from carrying the costs associated with the provision of video dialtone. Depending on the architecture used, some costs will be



an excessive allocation of costs to video dialtone service would also be inappropriate. Any allocation of joint costs will require the balancing of many interests. The Commission must integrate its regulation of interstate video dialtone service into its existing regulatory framework, just as must the States, including California, for their intrastate regulatory frameworks.

On October 9, 1992, California filed a petition for reconsideration of the Commission's Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, FCC 92-327, adopted in CC Docket No. 87-266 on July 16, 1992. released August 14, 1992. and publicly noticed on

CONCLUSION

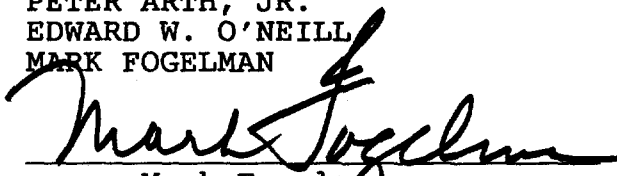
California supports the CFA/NCTA joint petition, consistent with the views expressed herein.

DATED: May 20, 1993.

Respectfully submitted,

PETER ARTH, JR.
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By:


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Commission of the State
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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MAY 21 1993

In the Matter of

Telephone Company-Cable Television
Cross-Ownership Rules, Section
63.54-63.58

FCC MAIL BRANCH

CC Docket No. 87-266

PETITION OF THE PEOPLE OF THE STATE OF CALIFORNIA
AND THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA FOR RECONSIDERATION

The People of the State of California and the Public Utilities Commission of the State of California ("California") hereby respectfully petition the Commission for reconsideration of its Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking ("Second Report and Order"), FCC 92-327, adopted in the above-entitled docket on July 16, 1992, released August 14, 1992, and publicly noticed on September 9, 1992, 57 Fed.Reg. 41106 (Sept. 9, 1992).

California seeks reconsideration of the Commission's determination that it possesses "exclusive jurisdiction" over video dialtone service because "the local telephone company facility is an 'integral component in an indivisible dissemination system which forms an interstate channel of communication.'" Second Report and Order, ¶ 72, citing General Telephone Company of California v. FCC, 413 F.2d 390, 401 (D.C. Cir. 1969). California submits that reconsideration is appropriate because video dialtone service is a communication

service offered by telephone companies, not a cable¹ or broadcasting service, and is subject to the dual jurisdictional system established by Congress in the Communications Act of 1934 and particularly Section 2(b)(1) of the Act, 47 U.S.C. § 152(b)(1), which deprives the Commission of jurisdiction over "charges, classifications, practices, services, facilities, or regulations" to the extent they are "for or in connection with intrastate communication service by wire or radio of any carrier." Moreover, California contends that in order to preserve the dual jurisdictional system established by Congress, it is incumbent on the Commission to establish at this time a clear and broad requirement that video dialtone services and facilities be designed in a fashion that will assure that their intrastate aspects can be jurisdictionally separated from their interstate aspects so as to permit legitimate federal regulation of interstate service and legitimate state regulation of intrastate service.

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1. California fully concurs in the Commission's determination that telephone companies providing video dialtone service are not "cable operators" and do not provide "cable service" within the meaning of the Cable Act. See, e.g., Memorandum Opinion and Order on Reconsideration, FCC 92-326, In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, adopted July 16, 1992, released Aug. 14, 1992, publicly noticed Sept. 9, 1992.

I

VIDEO DIALTONE SERVICES AND FACILITIES ARE COMMUNICATION
SERVICES AND FACILITIES SUBJECT TO THE DUAL
JURISDICTIONAL SYSTEM ESTABLISHED BY CONGRESS AND
ARE NOT SUBJECT TO "EXCLUSIVE" COMMISSION JURISDICTION

Section 2(b)(1) of the Communications Act of 1934, 47 U.S.C.
§ 152(b)(1), reserves to the states the authority to regulate
intrastate communications and the services and facilities "in
connection with" such communications. The statute provides:

[N]othing in the [Act] shall be construed to
apply or to give the Commission jurisdiction
with respect to (1) charges, classifications,
practices, services, facilities, or
regulations for or in connection with
intrastate communications by wire or radio of
any carrier

In Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986),
the U.S. Supreme Court interpreted § 2(b)(1) broadly, stating as
follows:

By its terms this provision fences off from
FCC reach or regulation intrastate matters --
indeed, including matters "in connection
with" intrastate service. Moreover, the
language with which it does so is certainly
as sweeping as the wording of the provisions
declaring the purpose of the Act and the role
of the FCC.

Id. at 370; see also California v. FCC, 905 F.2d 1217, 1239-42,
(9th Cir. 1990).

In its comments filed herein on January 31, 1992, California
argued that the provisions of video dialtone on an intrastate
basis is subject to state regulation pursuant to Section 2(b)(1).

California Comments, at 7, 11. Nevertheless, in its Second Report and Order, the Commission stated that it "has exclusive jurisdiction in th[e] area [of construction and operation of video transmission facilities] because the local telephone company facility is an 'integral component in an indivisible dissemination system which forms an interstate channel of communication.'" Id., at ¶ 72, quoting General Telephone Company of California v. FCC, 413 F.2d 390, 401 (D.C. Cir. 1969), cert. denied, 396 U.S. 888 (1969) (emphasis added).

The Commission's reliance on General Telephone is misplaced. In that case, the service at issue was the transmission by wire of telephone and radio broadcast signals originating in other states from a community antenna television ("CATV") antenna to CATV system subscribers. Here, on the other hand, the service at issue is a new, as-yet-undefined telephone communication service which may not involve either transmissions other than by telephone facilities or the transmission of regularly scheduled one-way video programming provided by licensed broadcasters. Indeed, the nondiscriminatory access requirements established by the Commission appear designed to ensure that most of the video services carried over video dialtone will not be the programming of licensed broadcasters; the Commission's order grants access to

Co., 392 U.S. 157, 178 (1968). In claiming exclusive jurisdiction, the Commission has violated its own admonition that it should "avoid premature service descriptions and regulatory classifications of such services. Second Report and Order, ¶ 60.

As the Commission itself noted in the Second Report and Order, at ¶ 10:

Video dialtone will encourage the widespread distribution of video programming, based for the first time on nondiscriminatory video common carriage made available to the supporting multiple programmers. This is significantly different from the channel service the telephone companies now provide.

(Footnote omitted.)

This statement alone is sufficient to distinguish video dialtone from the CATV channel service involved in General Telephone. Video dialtone simply does not involve traditional "channel service." Id. at ¶ 10, text and n. 21.

In addition, the Court in General Telephone relied heavily on the fact that "CATV channel distribution service does not contemplate furnishing subscribers with intercommunicating service of the type usually identified with a telephone exchange," 413 F.2d at 401 n. 19, while most, if not all, of the transmissions utilizing video dialtone could well involve interactive communications by voice, data, video or a combination of the three. See Second Report and Order, ¶ 75 ("By contrast, many of the video services that could be provided over a video dialtone network involve a high degree of interactivity that would enable the subscriber to tailor the video images to his or her specific requests."). Thus, in NARUC v. FCC, 533 F.2d 601

(D.C. Cir. 1976), a case decided long after General Telephone, the Court of Appeals held that the use of CATV system leased access channels for two-way, point-by-point (albeit nonvideo) communications was intrastate telephone service not subject to FCC jurisdiction. In so ruling, the Court relied on Section 2(b)(1). Id. at 607, 610-11.

Finally, the Commission hypothesizes, and California agrees, that video dialtone will create "incentives for telephone companies to develop and establish networks capable of delivering voice, data, and video services on an integrated basis." Second Report and Order, at ¶ 19 (emphasis added). In fact, it is likely that the "advanced broadband network" hypothesized by the Commission would either be fully integrated with, or would partially or wholly replace, existing telephone networks. Such integration is sufficient to warrant classification of video dialtone service as a communication service offered by telephone companies.

The Commission's decision also errs in failing to acknowledge that video transmissions as hypothesized for video dialtone are little different than data transmissions subject to the dual jurisdictional scheme. Such transmissions are merely more sophisticated and involve more data. Hence the Commission's jurisdictional treatment of video transmissions, and its claim of "exclusive" jurisdiction over them, rests on a distinction without a difference. Video transmission over video dialtone constitutes a telephone communication service, just like the voice and data transmission services which can be delivered over

video dialtone facilities, and is thus subject to the Communications Act's dual jurisdictional scheme.²

In this regard, the Commission should clarify that its jurisdiction over video dialtone, both with respect to the first-level "common carrier" platform and the second-level enhanced service platform which the Commission classifies as "unregulated," applies only to the interstate aspects of such services. To the extent these platforms involve the provision of services on an intrastate basis, they fall under the authority of the states, and the Commission should so acknowledge in its decision.

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2. The Commission's assertion of "exclusive" jurisdiction over video transmissions is also arbitrary and capricious because it fails to consider an important aspect of this issue -- the cost allocation between video and non-video services. The need to address this matter was noted in California's Comments, as well as those of the New York State Department of Public Service, NARUC and others. Such cost allocation is necessary to ensure that the additional costs of deploying an advanced telecommunications network are recovered through revenues derived from the additional services that the network can provide and to ensure that telephone-company-provided video dialtone service competes fairly with non-telephone-company providers by preventing the cross-subsidy of video dialtone service, first level and second level, from non-video services.

In addition, the dual jurisdictional framework for video dialtone service requires jurisdictional cost separations just as is required for other telecommunications services and facilities subject to Section 2(b)(1). The Commission's failure to deal with separations issues is similarly arbitrary and capricious.

II

THE COMMISSION MUST REQUIRE THAT VIDEO DIALTONE BE DESIGNED AND PROVIDED IN A MANNER THAT WILL FACILITATE DUAL REGULATION

In order to preserve the dual jurisdictional system established by Congress, we strongly urge the Commission to establish at this time a clear and broad requirement that video dialtone services and facilities be designed in a fashion that will assure that their intrastate aspects can be jurisdictionally separated from their interstate aspects so as to permit legitimate federal regulation of interstate service and legitimate state regulation of intrastate service. At this juncture, video dialtone services and facilities are not in place. In order to facilitate adherence to the dual jurisdictional system established by Congress, in the absence of a clear showing of impossibility video service providers must provide the capability to permit dual regulation. Just as the Commission directed telephone companies to design their video dialtone facilities and services so as to offer sufficient capacity to serve multiple video programmers, see Second Report and Order, ¶ 30, it should now affirmatively require design and deployment in a way which facilitates dual regulation. A contrary ruling may be arbitrary and capricious and not in accordance with law because it undermines the dual jurisdictional

system established by the Communications Act of 1934.³

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3. California also wishes to encourage the Commission to adopt for video dialtone the degree of unbundling implicit in the Commission's ONA regime. The Commission points out that among the safeguards against discrimination and anticompetitive conduct is ONA, which it concludes constitutes an effective safeguard to ensure that independent providers are able to obtain nondiscriminatory access to the basic "bottleneck" functions of the BOCs. See generally Second Report and Order, ¶ 93. In its comments, California urged the Commission to consider a regulatory framework in which the functionalities employed by the LEC in providing the first-level platform are unbundled and available to video service providers and second-level gateway providers on an open access, nondiscriminatory basis. California Comments, at 8-10. NARUC advocated a similar framework ("VDT carriers providing services for public use should be required to offer 'basic' services on a tariffed, nondiscriminatory, unbundled common carrier basis under an ONA framework") NARUC Comments, at 7. An ONA-like framework for video dialtone service would allow users to have direct access to their preferred gateway and services without having the intermediate step of accessing a LEC-provided first level platform. Given the reliance the Commission has placed on existing safeguards to prevent discrimination and anticompetitive conduct, the Commission should, at a minimum, adopt an ONA-like framework for video dialtone service.

CONCLUSION

For these reasons, the Commission should grant this petition for reconsideration and modify its decision accordingly.

DATED: October 8, 1992.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA have been served this 20th day of May, 1993, upon all known parties of record herein.

A handwritten signature in black ink, appearing to read "Mark Fogelman", is written over a horizontal line.

Mark Fogelman
Counsel for the People of the
State of California and the
Public Utilities Commission of
the State of California